

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RACHEL L. OUJEZDSKY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Temple, TX

*Docket No. 00-1856; Submitted on the Record;
Issued November 20, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a low back injury while in the performance of duty on May 4, 1999; and (2) whether the Office of Workers' Compensation Programs properly denied merit review of appellant's claim pursuant to section 8128 of the Federal Employees' Compensation Act.¹

On May 19, 1999 appellant, then a 40-year-old program clerk, filed a notice of traumatic injury alleging that on May 4, 1999 she was "unloading/unpacking copier paper into cabinet. Twisting to put paper in cabinet, felt pain in lower back two days later [the pain] peaked." Appellant indicated that she received medical attention on May 6, 1999 from Dr. Sherry Polchinski, a chiropractor. The employing establishment controverted appellant's claim.

In support of her claim, appellant submitted a June 11, 1999 medical report from Dr. Polchinski diagnosing post-traumatic mild lumbar strain/sprain with myofascitis. She noted that appellant had been treated four times since her initial visit May 6, 1999 with good responses to heat, one treatment with electrical muscle stimulation, massage therapy and gentle stretching and adjustments to the lumbar spine. She further noted that appellant indicated that she had been able to do her workout with moderation and that the intense pain had since abated.

By letter dated July 13, 1999, the Office informed appellant and the employing establishment of the circumstances in which a chiropractor may be considered a physician under the Act.² The Office further stated that the evidence submitted was insufficient to establish that appellant sustained an injury on May 4, 1999. Appellant was provided a detailed list of questions to be answered.

¹ 5 U.S.C. § 8101 *et seq.*; 5 U.S.C. § 8128(a).

² 5 U.S.C. §§ 8101-8193; *see Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

On July 23, 1999 appellant submitted a duplicate copy of Dr. Polchinski's June 11, 1999 medical report in which she diagnosed mild lumbar sprain/strain with myofascitis. She indicated that no x-rays were taken "due to lack of indication at that time and pending response to treatment."

By decision dated August 31, 1999, the Office denied appellant's claim on the grounds that appellant failed to establish that she sustained an injury in the course of her federal employment.

In a letter dated September 22, 1999, appellant requested reconsideration.

By decision dated September 30, 1999, the Office denied appellant's request for reconsideration on the grounds that she did not identify the grounds upon which she requested reconsideration of her case and neither raised substantial legal questions nor included new and relevant evidence to warrant review of the Office's prior decision.

The Board finds that appellant failed to establish that she sustained an injury while in the performance of duty on May 4, 1999.³

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁵

In a traumatic injury case, in order to determine whether a federal employee actually sustained an injury in the performance of duty, it must first be determined whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

In this case, Dr. Polchinski did not diagnose a spinal subluxation. Section 8101(2) of the Act provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to

³ The Board notes that, subsequent to the Office's September 30, 1999 decision, Dr. Polchinski submitted a November 4, 1999 report; however, the Board cannot review evidence for the first time on appeal not previously before the Office at the time it rendered its decision.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

correct a subluxation as demonstrated by x-ray to exist and regulation by the Secretary.”⁸ Section 10.400(e) provides:

“The term ‘subluxation’ means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically must be demonstrable on any x-ray film to individuals trained in the reading of x-rays. A chiropractor may interpret his or her x-rays to the same extent as any other physician defined in this section.”⁹

Thus, where x-rays do not demonstrate a subluxation, a chiropractor is not considered a “physician” and his or her reports cannot be considered as competent medical evidence under the Act.¹⁰

Because Dr. Polchinski did not diagnose a subluxation, her opinion is not considered medical evidence.¹¹ Although appellant was specifically advised by the Office of the circumstances under which a chiropractor may be considered a physician and of the need to submit a medical opinion from a physician, she failed to provide any medical evidence diagnosing an injury causally related to the employment incident. Thus, there is no medical evidence of record to establish that appellant sustained an injury while in the performance of duty and appellant is not entitled to compensation.

The Board further finds that the Office properly denied appellant’s request for reconsideration and merit review of her claim on September 30, 1999.

Under section 8128(a) of the Act and its implementing regulation, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.¹² Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.¹³

Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.

⁸ 5 U.S.C. § 8101(2).

⁹ See 20 C.F.R. § 10.400(e).

¹⁰ See *Susan M. Herman*, 35 ECAB 669 (1984).

¹¹ *Id.*

¹² 20 C.F.R. § 10.606(b) (1999).

¹³ 20 C.F.R. § 10.608(b) (1999).

Appellant alleged that she only wanted continuation of pay and no other compensation. She did not advance a new legal argument that she had in fact sustained a compensable injury, or submit new relevant evidence to substantiate an injury. Thus, she has not submitted evidence that requires that the case be reopened.

The decisions of the Office of Workers' Compensation Programs dated September 30 and August 31, 1999 are hereby affirmed.

Dated, Washington, DC
November 20, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member